Supreme Court, U.S.
FILED

011542 OCT 16 2001

OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2001

CLARENCE THOMAS,

Petitioner,

vs.

TENNECO PACKAGING, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Judicial Circuit

PETITION FOR WRIT OF CERTIORARI

ETHEL L. MUNSON
Attorney for Petitioner
The Candler Building
Suite 1541
127 Peachtree Street, NE
Atlanta, GA 30303
(404) 588-0049

55pp

QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to clarify whether the employee should be allowed to establish the elements of a *prima facie* case without countering the articulated reason of the employer.

2. Certiorari should be granted to resolve the conflict within the circuit as to what evidence rises to the direct evidence standard in employment discrimination cases.

LIST OF PARTIES

As far as Petitioner is able to ascertain, the names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. Petitioner is unaware of any parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 2

Statute Involved 3

Statement of the Case 3

Reasons for Granting the Writ 9

I. Certiorari should be granted to clarify whether the employee should be allowed to establish the elements of a *prima facie* case without countering the articulated reason of the employer. 13

II. Certiorari should be granted to resolve the conflict within the circuit as to what evidence rises to the direct evidence standard in employment discrimination cases. 18

Conclusion 23

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Aikens v. United States Postal Serv. Bd of Governors,
460 U.S. 711, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983) 15

Albermarle Paper Co. v. Moody,
422 U.S. 405, 95 S. Ct. 2362, 453 L.Ed.2d 280 (1975) 13

Carter v. Three Springs Residential Treatment Facility,
132 F.3d 635 (11th Cir. 1998).....10, 20

Cline v. Catholic Diocese of Toledo,
206 F.3d 651 (6th Cir. 2001).....16

Cones v. Shalala,
199 F.3d 512 (D.C. Cir. 2000) 14, 18

Damon v. Fleming Supermarkets of Fla. Inc,
196 F.3d 1354 (11th Cir. 1999), *cert. den*,
120 S. Ct. 1962 (2000) 9, 18, 20

Davenport v. Riverview Gardens School District,
30 F.3d 940 (8th Cir. 1994).....17

Deneen v. Northwest Airlines, Inc,
132 F.3d 431 (8th Cir. 1998).....11

Earley v. Champion Int'l Corp,
907 F.2d 1077 (11th Cir. 1990).....20

Contents

Page

EEOC v. Alton Packaging,
901 F.2d 920 (11th Cir. 1990) 21

EEOC v. Wiltel, Inc.
81 F.3d 1508 (10th Cir. 1996) 10

Febres v. Challenger Caribbean Corp.
214 F.3d 57 (1st Cir. 2000). 19

Fernandes v. Costa Bros. Masonry, Inc.
199 F.3d 572 (1st Cir. 1999) 10, 20

Freeman v. Package Mach. Co.
865 F.2d 1331 (1st Cir. 1988) 17

Haas v. ADVO Sys. Inc.
168 F.3d 732 (5th Cir. 1999) 10

Hennessy v. Penril Datacomm Networks, Inc.
69 F.3d 1344 (7th Cir. 1995) 11, 22

Kerns v. Capital Graphics, Inc.
178 F.3d 1011 (8th Cir. 1999) 11

Lambert v. Ackerley,
180 F.3d 997 (9th Cir. 1999) (*en banc*), *cert. den.*
528 U.S. __, 120 S. Ct. 936, 145 L.Ed.2d 814 (2000) 10

Lightfoot v. Union Carbide Corp.
110 F.3d 898 (2d Cir. 1997) 11, 21

Contents

Page

McDonnell-Douglas v. Green,
411 U.S. 792, 93 S.Ct. 1817,
36 L.Ed.2d 668 (1973). 8, 10, 12, 13, 14, 15, 17

Nichols v. Loral Vought Sys. Corp,
81 F.3d 38 (5th Cir. 1996).....10

Ostrowski v. Atlantic Mutual Ins. Co,
968 F.2d 171 (2d Cir. 1992).....11

Price Waterhouse v. Hopkins,
490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1998) ...18

Radabaugh v. Zip Feed Mills, Inc,
997 F.2d 444 (8th Cir. 1993).....11, 21

Sheehan v. Donlen Corp,
173 F.3d 1039 (7th Cir. 1999).....11

Shorter v. ICG Holdings, Inc,
188 F.3d 1204 (10th Cir. 1999).....10

Standard v. A.B.E.L. Services, Inc,
161 F.3d 1318 (11th Cir. 1998).....9

Taylor v. Virginia Union University,
193 F.3d 219 (4th Cir. 1999)(*en banc*), *cert. den,*
528 U.S. ___, 120 S. Ct. 1243, 146 L.Ed2d 101 (2000) ...10

Thomas v. Denny's Inc,
111 F.3d 1506 (10th Cir. 1997).....17

Contents

Page

Thomas v. National Football League Players Ass'n.
131 F.3d 198 (D.C. Cir. 1997) 10

Walden v. Georgia-Pacific Corp.
126 F.3d 506 (3d Cir. 1997), *cert. den.*
523 U.S. 1074, 118 S. Ct. 1516,
140 L.Ed.2d 669 (1998) 10, 11

Wright v. Southland Corp.
187 F.3d 1287 (11th Cir. 1999) 9, 11, 18, 19, 20, 22

Statutes

28 U.S.C. § 1254 2
28 U.S.C. § 1331 2
42 U.S.C. § 1981 ..... 3, 6, 9
Civil Rights Act of 1964, *as amended*, "Title VII"
42 U.S.C. § 2000*e-seq.* 9, 11, 14, 15, 18, 20

Other Authorities

BNA's EEOC Compliance Manual 20
BNA's Employment Discrimination Report, ... 9
Eleventh Circuit Rule 36-1 2

APPENDIX

Appendix A – Opinion of the United States Court of Appeals for the Eleventh Circuit Filed July 25, 2001 ... 1.a.

Contents

Page

Appendix B –Final Order of the United States District Court for the Middle District of Georgia Entered September 1, 2000..... 1.b.

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term. 2001

CLARENCE THOMAS.

Petitioner.

vs.

TENNECO PACKAGING. INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Judicial Circuit

PETITION FOR WRIT OF CERTIORARI

Clarence Thomas respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Judicial Circuit.

OPINIONS BELOW

The United States District Court for the Middle District of Georgia entered summary judgment against Petitioner on September 1, 2000. Petitioner filed his timely

Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on September 6. 2000. Oral arguments were held on July 18. 2001. Pursuant to Eleventh Circuit Rule 36-1. the Eleventh Circuit affirmed without an opinion the judgment of the District Court on July 25. 2001. and Petitioner files this instant Petition for Writ of *Certiorari*.

JURISDICTION OF THIS COURT

The original jurisdiction of the District Court was conferred pursuant to 28 U.S.C. § 1331. The Eleventh Circuit affirmed the judgment of the District Court on July 25. 2001. and judgment was entered on that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

The pertinent provision of the Civil Rights Act of 1866, 42 U.S.C.§ 1981(a) ("§ 1981") is set forth below:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Clarence Thomas, an African American, began his employment with Tenneco's predecessor company, Owens Illinois, in 1978 when he was hired as an extra hand in the pulp mill. Owens Illinois, a paper mill, manufactured corrugated boxes and other paper products used for shipping. Petitioner entered Respondent's maintenance mechanic apprenticeship program[1] in 1982. He completed the program

[1] This was an apprenticeship program used by the Respondent to train incoming maintenance mechanics in each component of the paper mill

(continued)

in September 1985, and he was classified as an A-class mechanic.[2]

He was assigned to the paper machine maintenance for about 5 years, and then he was subsequently assigned to the woodyard in 1989. At that time, Bobby Mayer, the then Superintendent, asked him to "set-up"[3] as supervisor. In 1987, Petitioner applied for a maintenance mechanic, supervisory position. Although he received an interview, he was not selected for the position. Norman Bush, a white male, who had not been enrolled in the apprenticeship program, was selected for the position.

(continued)

(the major components of the mill were the paper machine, the pulp mill, the woodyard and the powerhouse).

[2] Incoming mechanics up until this time were brought in as D-class mechanics, and they progressed through the various levels, C, B and A, with A being the highest level in the journeyman progression. These positions were covered by a collective bargaining agreement entered into by Respondent and the United Paperworkers International Union.

[3] A bargaining-level employee acting temporarily for the permanent supervisor during periods of absentees was classified as a "set-up supervisor". There were no formal process or announcements for selecting set-up supervisors; the all-white mill management would ask whomever they wanted to serve as a set-up supervisor. Thus, no African Americans, with the exception of Petitioner, served as set-up supervisors during the relevant timeframe.

Another supervisor position became available in 1991; Petitioner applied for this position. The Respondent selected a white, A-class mechanic who completed the apprenticeship program ***after*** Petitioner. Both of the foregoing supervisors were rotated to the woodyard, and Petitioner was required to train them.

In 1997, Larry Chaney, a white A-class mechanic, who had less set-up tenure than Petitioner, was assigned as a set-up supervisor in the pulp mill. Mr. Chaney continued as a set-up supervisor in this position for 15 months until he was promoted to a permanent supervisor in this same position. Petitioner inquired if he could be temporarily assigned as a set-up supervisor in this position when Mr. Chaney, because of a dispute or disagreement with Respondent, abandoned the position. Petitioner's request was summarily denied. Matter of fact, Dewey Foster, a decisionmaker, told Petitioner that "this was Larry's job, and that there was no need for [Petitioner] to but in".

Up until this time, Petitioner was the only African-American maintenance mechanic who served as a set-up supervisor. Additionally, Respondent had never promoted an African American from its bargaining level workforce, which consisted of over 375 employees to a supervisory salaried position, since the inception of Petitioner's employment with the company until he filed the subject case.

The position that Mr. Chaney received was not announced. As a result thereof, pursuant to § 1981, Petitioner filed suit alleging a continuing failure to promote based upon race. In 1999, after Petitioner filed his lawsuit, he applied for a posted supervisory position. Even though Petitioner received no additional training, education and/or different type of experience, he was instantly selected – thus, he became the ***first*** African-American, maintenance mechanic supervisor promoted from the bargaining-level workforce to join the all-white mill managerial staff.

The all-white mill management was not very tolerant of its African-American employees. The management, inclusive of [4]one of the decisionmakers and the other high-level mill managers, often referred to African Americans as "***niggers***" and entertained themselves by frequently telling racially offensive jokes.

Another decisionmaker, Dewey Foster, who was Petitioner's first and second-line supervisor, for the entire time that he was serving as a set-up supervisor, often referred to Petitioner as a "***boy***". On several occasions, Mr. Foster

---

[4] Larry Ferrell, a decisionmaker, often disparaged African Americans. The racial jokes and the disparaging racial terms permeated the entire climate in the workplace in which the instant personnel decision was made as well as subsequent other personnel decisions.

told Petitioner, "***boy*** you had better watch yourself, and stay in your place if you want to keep setting up for me!"

Additionally, when Petitioner complained that some of the white set-up crew would not take his directions when he was serving as a set-up supervisor, Mr. Foster's only reply was "what's the matter, ***boy***, you can't take it" or this is still the "Old South". Petitioner reported Mr. Foster's racial comments to the then mill manager, M.C. Wooley, who acknowledged that the comments were racially offensive. Mr. Wooley's usual response was that he would speak with Mr. Foster about the matter, but the situation continued until Petitioner filed the subject-matter lawsuit.

The District Court held that Petitioner could not establish a *prima facie* case because he was not qualified for the position at issue because he ***virtually***[5] had no experience

---

[5] Petitioner is not sure as to the context that the District Court is using the term "virtually" (it is a subjective term). Petitioner had just as much or even more experience in the pulp mill than Mr. Foster, a decisionmaker and predecessor in the position at issue. Prior to Mr. Foster's move from the woodyard to supervisor in the pulp mill, he had no set-up or permanent supervisory experience in the pulp mill. He testified during depositions that he had worked in the pulp mill as a maintenance mechanic on occasions but he could give no specific times or duration of his tour in the pulp mill. Tom Putnam, a decisionmaker, claimed that since portions of the woodyard were under the pulp mill, this provided

(continued)

in the pulp mill. Additionally, the District Court held that some undefined, anecdotal evidence included in the record did not rise to the level of direct evidence. As such, the District Court granted summary judgment to the employer [Appendix B].

Petitioner appealed, and during oral argument, the Eleventh Circuit's panel judges appeared to having been asking relevant questions of the attorneys on different aspects of the case than the District Court addressed in its summary judgment order. Notwithstanding such[6], the Eleventh

(continued)

Mr. Foster's with the needed experience to assume the position. Accepting this position as truthful, then Petitioner, who was the set-up supervisor for Mr. Foster during Mr. Foster's tour in the wood yard, had the same training and experience with the pulp mill components (so how is it that Mr. Foster was qualified for the position, and the District Court held that Petitioner lacked the minimum qualifications for the position because he ***virtually*** had no experience in the pulp mill?). Moreover, Petitioner had been assigned to the pulp mill during crew rotation the same as any other A-class mechanic (the District Court disregarded this record evidence). This is exactly why this Court set forth the evidentiary burdens in *McDonnell-Douglas* – when properly applied, it keeps the trial judge from inserting his own personal views or beliefs that may not be based on record evidence.

[6] It has been statistically proven that employment discrimination plaintiffs-appellants do not fair well in any of the Circuits on appeal (*See BNA's*

(continued)

Circuit's panel affirmed pursuant to its Internal Operating Rule 36-1, thus adopting the written opinion of the District Court as its own [Appendix A].

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to resolve a split[7] between the Federal Circuit Courts of Appeals on an important Title VII[8] issue – what statements or actions of the employer constitute direct evidence thus removing the case

(continued)

Employment Discrimination Report, Vol. 17 No. 3 p. 78 (July 18, 2001))(43.61 percent nationwide of all plaintiffs' verdict reversed on appeal while only 5.8 percent of defendants' verdicts reversed).

[7] The U.S. Court of Appeals for the Eleventh Circuit is not only in conflict with other Courts of Appeals, but there are two conflicting lines of cases within the Eleventh Circuit defining "direct evidence" (*See Damon v. Fleming Supermarkets of Fla. Inc*, 196 F.3d 1354 (11th Cir. 1999), *cert. den*, 120 S. Ct. 1962 (2000); *Wright v. Southland Corp*, 187 F.3d 1287 (11th Cir. 1999)(two panel members concurred in the judgment but not the writing judge's definition of direct evidence). *Also, See Appendix B, pp. 13.b. - 15.b., n.34* (District Court addresses the direct evidence conflict within in the Eleventh Circuit).

[8] The case at bar is not a Title VII case, but in the Eleventh Circuit, the evidentiary standards for all other employment discrimination cases, inclusive of § 1981 cases, are the same as Title VII (*See Standard v. A.B.E.L. Services, Inc*, 161 F.3d 1318, 1330 (11th Cir. 1998)).

from the traditional *McDonnell-Douglas*[9] circumstantial methodology.

Without a "definitive rule" or at least more specific guidance, the lower courts have used a hodgepodge of conflicting definitions for "direct evidence" (*See Fernandes v. Costa Bros. Masonry, Inc*, 199 F.3d 572, 582 (1st Cir. 1999))(the U.S. Court of Appeals for the First Circuit defines the three different theories[10] that have developed over the

---

[9] *See McDonnell-Douglas v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973).

[10] (a) ***The Classic Position*** – Direct evidence is evidence that proves the fact of a discriminatory animus without inference or the introduction of other evidence (*citing, Shorter v. ICG Holdings, Inc*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Haas v. ADVO Sys. Inc*, 168 F.3d 732, 734 n. 2 (5th Cir. 1999); *EEOC v. Wiltel, Inc*, 81 F.3d 1508, 1514 (10th Cir. 1996); *Nichols v. Loral Vought Sys. Corp*, 81 F.3d 38, 40 (5th Cir. 1996); *Carter v. Three Springs Residential Treatment Facility*, 132 F.3d 635, 641 (11th Cir. 1998)).

(b) ***The Animus Plus Position***- Reflects directly on the alleged discriminatory animus and relates to the contested employment decision (*citing, Taylor v. Virginia Union University*, 193 F.3d 219, 232 (4th Cir. 1999)(*en banc*), *cert. den*, 528 U.S. ___, 120 S. Ct. 1243, 146 L.Ed2d 101 (2000); *Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997); *Lambert v. Ackerley*, 180 F.3d 997, 1008-09 (9th Cir. 1999) (*en banc*), *cert. den*, 528 U.S. __, 120 S. Ct. 936, 145 L.Ed.2d 814 (2000); *Walden v. Georgia-Pacific Corp*, 126 F.3d 506, 513

(continued)

course of time, and the respective circuits adopting the various positions).

The decision of the U. S Court of Appeals for the Eleventh Circuit demonstrates the danger that continued uncertainty as to what statements or actions of the employer constitute direct evidence will eviscerate Title VII and the other Federal employment discrimination protection. Without clear-cut guidance, the Eleventh Circuit continues to make it difficult, if not impossible, for employees who are purposefully placed in unique positions without suitable comparators by unlawful employers seeking to avoid

(continued)

(3d Cir. 1997), *cert. den.* 523 U.S. 1074, 118 S. Ct. 1516, 140 L.Ed.2d 669 (1998); *Sheehan v. Donlen Corp.* 173 F.3d 1039, 1044 (7th Cir. 1999); *Deneen v. Northwest Airlines, Inc.* 132 F.3d 431, 436 (8th Cir. 1998)).

(c) ***The Animus Position***- Direct evidence is any discriminatory animus whether it is tied to the challenged personnel action or not (*citing, Lightfoot v. Union Carbide Corp.* 110 F.3d 898, 913 (2d Cir. 1997); *Ostrowski v. Atlantic Mutual Ins. Co.* 968 F.2d 171, 181-82 (2d Cir. 1992); *Kerns v. Capital Graphics, Inc.* 178 F.3d 1011, 1017-16 (8th Cir. 1999); *Radabaugh v. Zip Feed Mills, Inc.* 997 F.2d 444, 449 (8th Cir. 1993); *Wright v. Southland Corp.* 187 F.3d 1287, 1303-04 (11th Cir. 1999); *Hennessy v. Penril Datacomm Networks, Inc.* 69 F.3d 1344, 1348-50 (7th Cir. 1995)).

statutory liability, to mount employment discrimination challenges.

Additionally, this Court should also grant the writ to re-direct the U.S. Court of Appeals for the Eleventh Circuit, which has sanctioned a departure by its lower court of this Court's holdings in the landmark case, *McDonnell-Douglas v. Green, id.* This Court held 28 years ago that the establishment of the *prima facie* case is not an onerous burden. It is merely an orderly procedure for the parties to present their evidence.

The second prong of *McDonnell-Douglas, id* does not require the employee to counter the employer's articulated reason for the challenged personnel action. Indeed to do so, raises the evidentiary bar for the employees, and thus creates a safe harbor for such employers with a prone disposition to violate the anti-discrimination laws.

This continued course of action not only defeats the purpose of this Court's decision in *McDonnell-Douglas, id*, but it also creates a legal "loophole" in the Federal employment discrimination statutes thus undermining the intent of the United States Congress. The Eleventh Circuit's concurrence with such straying by its District Court from long standing landmark decisions precludes the victims of discrimination from pursuing the relief that this Court held

should be liberally applied to victims of workplace discrimination (*See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-19, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975)). This result cannot stand.

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER THE EMPLOYEE SHOULD BE ALLOWED TO ESTABLISH THE ELEMENTS OF A PRIMA FACIE CASE WITHOUT COUNTERING THE ARTICULATED REASON OF THE EMPLOYER.

The Eleventh Circuit and its District Court's opinion in this case unduly raises the evidentiary burden that the employees must meet to establish a *prima facie* case by incorporating the employer's articulated reason in this stage of the analysis. By holding in conflict with the vast majority of the other circuits – that the second prong of *McDonnell-Douglas* analysis is a comparison of the contenders' qualifications, the Eleventh Circuit defeats the purpose of *McDonnell-Douglas* burden shifting.

In the case at bar, the District Court held that since Petitioner ***virtually*** had no experience in the pulp mill, the department that housed the contested position, he was unable to establish that he was qualified for the position. The Respondent articulated that the reason Mr. Chaney was

selected in part was because of his set-up experience in the pulp mill. Respondent further articulated that its managers did not consider anyone else for this selection because Mr. Chaney had been temporarily performing the duties of the challenged position during the preceding 15 months that he served as a set-up supervisor.

This line of reasoning undermines Title VII and the other Federal employment discrimination statutes and does nothing more than create a legal loophole in these statutes. Such a result is inapposite to the D.C. Circuit's decision in *Cones v. Shalala*, 199 F.3d 512 (D.C. Cir. 2000). The foregoing case, with striking similarities to the case at bar, involved the lateral transfer of a white employee to the challenged position thereby denying an African-American employee an equal right to be promoted to the position. The employer argued and the District Court agreed that the African-American employee could not establish a *prima facie* case because he was not "technically" qualified for the position since he did not occupy said position like the white selectee.

The D.C. Circuit Court of Appeals rebuffed this position, and held that such logic undermines *McDonnell-Douglas* and does nothing more than create a legal loophole in the Title VII, *id* at 518. As the D.C. Circuit further held

nothing in either Title VII or *McDonnell-Douglas*. *id* supports such a counterintuitive result.

Any employer who sought to evade the authority of the Federal employment discrimination statues need only transfer non-protected class employees, or as in the case at bar, assign white employees to set-up positions, then select them for the position. To remove their actions from the purview of the foregoing statutes, they need only argue that the minority was not "technically" qualified because he ***virtually*** had no experience in the department that housed the contested position.

Such a position must not stand because it would ensure "the slow death of Title VII as well as the other Federal employment discrimination statues". At minimum, these statutes should be able to die with dignity, if that is to be, and not by shallow case law that undermines the authority[11] of this Court as well as the authority of the United States Congress.

---

[11] This Court has long since held in *Aikens v. United States Postal Serv. Bd of Governors*, 460 U.S. 711, 103 S. Ct. 1478, 75 L.Ed.2d 403 (1983) that the District Court erred when it required the Petitioner to establish anymore than he was black; that he possessed the minimum qualifications for the position; and that the position had been filled with an individual outside of his protected class. As this Court held, Petitioner was not

(continued)

Moreover the Eleventh Circuit is in direct contradiction with the other Circuits that have addressed this issue (*See Cline v. Catholic Diocese of Toledo*[12], 206 F.3d 651 (6th Cir. 2001))(District Court erred by using employer's

(continued)

---

required to establish as part of his *prima facie* case that he was as qualified or more qualified than the people ultimately promoted. In the case at bar, the Eleventh Circuit and its District Court are "backdooring" this principle of law, by subjectively measuring relative assessment of the contenders' qualifications during the *prima facie* case. Nowhere in its order, did the District Court find that Petitioner did not possess the qualifications to perform maintenance mechanic work in the pulp mill or that Petitioner was not qualified to serve as a set-up supervisor. What is most troubling is the employer found a loophole around the Federal employment discrimination statutes, and the District Court expanded the loophole for whatever reason. Employees must be able to mount legal challenges to any perceived discriminatory personnel actions without undue manipulation. Any other course of action flagrantly flies in the face of Congressional intent.

[12] The Eleventh Circuit did not address the difference between the U.S. Court of Appeals for the Sixth Circuit's rejection of the incorporated articulated reasons into the *prima facie* analysis and the Eleventh Circuit's District Court's inclusion of the articulated reason in the *prima facie* analysis notwithstanding Petitioner's extensive briefing of this case in his appellate briefs and during oral argument that may have been perfunctory and a mere "exercise in futility". This irreconcilable split between the other circuits and the Eleventh Circuit alone would provide sufficient grounds for review by this Court.

articulated reason to rule against employee at the *prima facie* stage). *See Thomas v. Denny's Inc.* 111 F.3d 1506, 1510 (10th Cir. 1997)("relying on defendant's reasons for the adverse action as a basis for ruling against the plaintiff at the *prima facie* stage raises serious problems under the *McDonnell-Douglas, id* analysis"). *See Davenport v. Riverview Gardens School District*, 30 F.3d 940, 944 (8th Cir. 1994)(disapproving of District Court's *prima facie* analysis because "it required plaintiff, at the outset, to disprove defendant's alleged business reasons for its adverse action").

See Freeman v. Package Mach. Co, 865 F.2d 1331, 1335-36 (1st Cir. 1988)("looking only at plaintiff's evidence that he was qualified for the position for the *prima facie* purposes, and considering defendant's evidence to the contrary during the rebuttal stage").

The Eleventh Circuit and its District Court must not be allowed to ignore decades of employment discrimination case law to foster the employer's belief – that it can do what it wants to do, and to avoid legal liability it must plan ahead (transfer the non-protected class employee to the challenged position; deny the minority the same opportunity so when the minority does mount the legal challenge - the employer, to defeat the minority's *prima facie* case, need only argue "that since the minority had no ***virtual*** experience in that department he was not qualified"). As the D.C. Circuit held,

such a course of action is counterintuitive to Title VII, its protection and its purposes (*See Shalala, id* at 518).

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT WITHIN THE CIRCUIT AS TO WHAT EVIDENCE RISES TO THE DIRECT EVIDENCE STANDARD IN EMPLOYMENT DISCRIMINATION CASES.

There exists among the Federal Circuits of the Federal Judicial System a conflict as to what evidence rises to the direct evidence standard in employment discrimination litigation *(See pp. 10, 11 n. 10 herein for three different positions that have evolved in Title VII and its related litigation).* This Court has long since highlighted the importance of direct evidence in Title VII litigation (*See Price Waterhouse v. Hopkins,* 490 U.S. 228, 276-77, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1998)).

In the Eleventh Circuit, there is an internal conflict between the different judges, some of whom on the same panel concurred with the writing judge's judgment but not his definition of direct evidence (*See Wright, id* at 1293; *Damon, id* at 1358-59). The Eleventh Circuit in *Damon, id*, has adopted the position that direct evidence must indicate the

complained-of employment decision[13] was motivated by the decisionmaker's [discriminatory conduct]. The writing judge

---

[13] Respondent has adopted the vague position that unless the discriminatory remarks are made by the ultimate decisionmaker and in conjunction with the challenged personnel action that such do not constitute direct evidence in the Eleventh Circuit. For the purpose of this *Petition for a Writ of Certiorari*, it is not necessary to address Respondent's position because even under the most stringent version of direct evidence, Petitioner believes such a position is non-tenable. Petitioner further believes the same as the United States Court of Appeals for the First Circuit that held:

> Taking a somewhat different tack, CCC asseverates that the evidence does not bear squarely on the contested employment decisions because Domenech's remark, as reported merely posited that age was used as a criterion "in some cases" without specifically mentioning the appellants. This argument assumes that a statement cannot bear squarely on an employment decision unless it specifically refers to that decision. Both case law, [citation] (stating that "evidence may 'bear directly' on a decision without referring to it specifically"), and common sense refute that assumption. Indeed, a contrary rule would mean that the greater never could be construed to include the lesser.

(*See Febres v. Challenger Caribbean Corp.* 214 F.3d 57, 60-61 (1st Cir. 2000)).

in *Wright, id* defined direct evidence as "evidence from which a reasonable trier-of-fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic" (*See Wright, id* at 1293).

The United States Equal Employment Opportunity Commission, hereinafter EEOC, describes "direct evidence of motive as any statement by an official of respondent that indicates a bias against members of a particular group" (*See BNA's EEOC Compliance Manual § 604.3(c)(1) at 604:0011-12).* In addition the EEOC concludes that direct evidence is presented by a showing that respondent failed to take appropriate corrective action in situations in which it knew or reasonably should have known that its practices and policies or the behavior of its employees were discriminatory, *id.* The EEOC has long since held that disparaging references to a charging party's Title VII class by a person involved in the decision-making process can sufficiently fit that legal definition, *id.*

The Eleventh Circuit's position in *Damon, id,* is somewhat of a hybrid position between the (a) *Classic Position* and the (b) *Animus Plus* position. The Eleventh Circuit cites *Carter, id* that has been classified by the First Circuit as a *Classic* position. However, in *Damon, id,* it also cites *Earley v. Champion Int'l* Corp, 907 F.2d 1077, 1081-82 (11th Cir. 1990) which can be classified as an *Animus Plus*

under the *Fernandes* Court's categorization ("Fire Earley – he is too. old").

No matter, in the case at bar, the Eleventh Circuit held that the frequent use of the word ***nigger*** by Larry Ferrell, one of the decisionmakers[14], and the frequent references to Petitioner, an adult African-American male, as a "***boy***" by Dewey Foster, another one of the decisionmakers, are not sufficient to trigger the "direct evidence" standard. The Eleventh Circuit's approach unduly limits the reach of "direct evidence" theory in employment discrimination litigation. By holding thusly, the Eleventh Circuit is in direct conflict with at least four[15] other Circuit Courts of Appeals as well as

---

[14] The District Court dismisses the bigoted behavior of Mr. Ferrell and Mr. Foster because Tom Putnam made the ultimate decision, notwithstanding that it was a joint decision made with input from Mr. Ferrell and Mr. Foster. Petitioner argues that such a course of action, defies Eleventh Circuit's precedent as well as lacking in judicial integrity (*See EEOC v. Alton Packaging*, 901 F.2d 920, 924 (11th Cir. 1990)("Alton misses the point. the statements indicate a decidedly negative attitude towards black people on the part of two individuals ***responsible*** for promotions").

[15] *Second Circuit-Lightfoot, id* at 913 (direct evidence in an age discrimination termination case where employee testified that decision-maker expressed surprise and disbelief that employee wanted to work until he was 70 years old).

Eight Circuit – Radabaugh, id at 449 (direct evidence in an age discrimination termination case where employee introduced employer's

(continued)

a prior decision authored by one of its own Circuit Judges *(See Wright, id at 1305.)*

It escapes competent reasoning how one decisionmaker's references to Petitioner as a "boy" or the frequent use of the word "nigger" by another decisionmaker falls short of direct evidence. To hold with the Eleventh Circuit, would permit bigoted employers to escape liability under the Federal employment discrimination statutes because their bigotry was not directly directed towards the challenged

(continued)

1987 and 1985 corporate planning documents that contained the heading "Young managers" with accompanying text that read "Top and middle managers are mostly young, well educated and results oriented").

Seventh Circuit – Hennessy, id at 1350 (employer's remarks to prior pregnant employee, "[he] was surprised to see her pregnant because he always thought she was a 'career woman' along with other decisionmaker's statements that he did not like to hire woman in the field because they get pregnant were sufficient to trigger mixed motive instruction in sex termination case).

Eleventh Circuit –Wright id at 1303 (employer's statement in an age discrimination termination case, "employee might want to cease working as a 7-11 store manager because he may be getting too, old to understand the store's new computer programs" in addition to another one of the employer's statements that "the employee was too, old and that they were looking for a younger manager" constituted direct evidence).

personnel action (how does one compartmentalize his/her thought process?).

This defies common sense. On one hand, the employer believes that the African Americans are sub humans (*"niggers"*) but on the other hand, the same employer has the ability to see the African-American contender as having qualifications for the position.

To narrowly draw the definition of "direct evidence" would permit employers with bigoted attitudes to escape liability by carefully limiting their biased remarks to non-personnel matters. Thus, this does nothing more than raise the evidentiary bar for the employment discrimination plaintiffs, and undermines the intent of the United States Congress – that it wants employers vigorously prosecuted for discrimination in the workplace.

CONCLUSION

For all the reasons stated herein, the Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

ETHEL L. MUNSON
Attorney for Petitioner
The Candler Building, Suite 1541
127 Peachtree Street, NE
Atlanta, GA 30303
(404) 588-0049

APPENDIX A- ELEVENTH CIRCUIT OPINION -

DATED JULY 25, 2001

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-14691*

D.C. Docket No. 98-0107-CV-HL-7

CLARENCE THOMAS.

Plaintiff-Appellant,

versus

TENNECO PACKAGING CO., INC.,

Defendant-Appellee.

Appeal from the United States District Court

For the Middle District of Georgia

(July 25, 2001)

Before TOJOFLAT, DUBINA and DUHE*, Circuit Judges.

---

* Honorable John M. Duhe, Jr., U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Appendix A

PER CURIAM:

AFFIRMED. See 11th Cir.R.36-1[1]

---

[1] 11th Cir.R-361 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without an opinion.

APPENDIX B- DISTRICT COURT ORDER- ENTERED ON SEPTEMBER 1, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLED DISTRICT OF GEORGIA
VALDOSTA DIVISION

CLARENCE THOMAS,	:	
Plaintiff.	:	
v.	:	Civil Action
TENNECO PACKAGING, INC.,	:	No. 7:98-CV-107(HL)
Defendant.	:	

ORDER

The following motions are pending in the above-captioned matter: Defendant's Motion for Summary Judgment [Tab 80], Plaintiff's Motion for Leave to File a Supplement to Plaintiff's Response to Defendant's Motion for Summary Judgment [Tab 103], Defendant's Motion to Exclude Affidavit Testimony Submitted by Plaintiff [Tab 105], and Plaintiff's Motion to Expedite the Proceedings or Immediate Certification [Tab 108]. The Motion to Expedite is denied as moot. The Motion for Leave to File a Supplement to Plaintiff's Response to Defendant's Motion

for Summary Judgment is granted.[1] The Motion to Exclude Affidavit Testimony Submitted by Plaintiff is denied; the Court will consider Defendant's challenges to the affidavits as objections to testimony when it rules on the merits of the pending summary judgment motion. *See e.g.*, Pinkerton & Laws Co. v. Roadway Exp., 650 F. Supp. 1138 (N.D. Ga. 1986). Defendant's Motion for Summary Judgment is discussed in detail below:

I. BACKGOUND

Plaintiff, Clarence Thomas, is an African-American who has been employed by Defendant Tenneco Packaging Company and its predecessor companies since 1978. On December 14, 1998, Plaintiff filed a Complaint in this Court alleging that he had been subjected to racial discrimination in violation of 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991. In his Complaint, Plaintiff contends he was wrongfully passed over for promotions in 1987, 1991, and 1998.

After the parties engaged in discovery, Defendant filed the Motion for Summary Judgment at issue here. In

[1] The Court has also considered Plaintiff's Amended Supplement to Plaintiff's Response to Defendant's Motion for Summary Judgment.

moving for summary judgment. Defendant contends some of Plaintiff's claims are time barred[2] and that Plaintiff has failed to show that he was qualified for the positions he sought or that Defendant was motivated by discriminatory intent. Plaintiff, of course, opposes the Motion. After careful consideration of the pleadings, depositions, answers to interrogatories, and the affidavits, the Court hereby grants the Motion for the reasons that follow.

II. SECTION 1981

A. Evidentiary Framework

The text of 42 U.S.C. § 1981 provides, in part, as follows:

> All persons within the jurisdiction of the United States shall have the same right in

---

[2] Although Defendant raised a statute of limitations defense in its Answer, Defendant did not argue the statute of limitations defense in its Motion for Summary Judgment, but argued it for the first time in its Reply Brief in Support of its Motion for Summary Judgment. Plaintiff sought leave of Court to file a supplemental response to Defendant's Motion and attached a copy of his proposed response to the request for leave. The supplemental response did not address the statue of limitations issue, nevertheless, the Court will consider the appropriateness of the statute of limitations defense.

> every State and Territory to make and enforce contracts...as is enjoyed by white citizens...
>
> For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

42 U.S.C. § § 1981(a) & (b)(1994). Like Title VII, Section 1981 "affords a federal remedy against discrimination in private employment on the basis of race". Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60, 95 S. Ct. 1716, 1720 (1975). Although a plaintiff pursuing a claim under 42 U.S.C. § 1981 will not be required to satisfy the various administrative prerequisites that are a part of a Title VII claim, in order to succeed on a claim brought under § 1981, a plaintiff is required to prove purposeful discrimination in the same way a Title VII plaintiff with a disparate treatment claim must prove purposeful discrimination. General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391, 102 S. Ct. 3141, 3150 (1982). Thus, the courts have generally held that racial

discrimination employment claims brought under § 1981 are governed by the same evidentiary framework as claims brought under Title VII. *See, e.g.* Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998).

B. Statute of Limitations

Although governed by the same evidentiary framework, Title VII and § 1981 claims differ with respect to the limitations periods which govern them. Unlike Title VII, in which the right to bring claims is governed by strict, administrative procedural prerequisites, the right to bring claims under § 1981 is governed by the appropriate statute of limitations period of the state in which the claim arose. Howard v. Roadway Express, Inc., 726 F.2d 1529, 1531 (11th Cir. 1984). For claims brought in Georgia, the United States Court of Appeals for the Eleventh Circuit has held that the statute of limitations is governed by O.G.C.A. § 9-3-22, which provides:

> All actions for the enforcement of rights accruing to individuals under statutes or acts of incorporation or by operation of law shall be brought within 20 years after the right of action has accrued; provided, however, that all actions for the recovery of

> wages, overtime, or damages and penalties accruing under law respecting the payment of wages and overtime shall be brought within two years after the right of action has accrued.

O.G.C.A. § 9-3-22 (1982). In the § 1981 context, the Eleventh Circuit has construed this provision to mean that claims for equitable relief are barred only after 20 years, but claims for back pay are barred after only 2 years. Howard, 726 F.2d at 1532. *See also* Alexander v. Fulton County, Ga., 207 F.3d 1303, 1346 (11th Cir. 2000)(noting that statute of limitations for § 1981 claims is two years).

Under the limitations analysis set forth in Howard, therefore, Plaintiff's claims for any relief other than equitable relief for discrimination occurring in 1987 and 1991 are foreclosed by the statute of limitations because more than two years elapsed before he filed his Complaint as to those claims. Therefore, the Court will not address Plaintiff's claims for back pay and damages insofar as they pertain to the 1987 and 1991 promotion decisions.

In addition to seeking relief in the form of back pay and damages, however, Plaintiff also seeks a declaratory judgment "that the acts of discrimination, based on race

violates 42 U.S.C. § 1981" and also seeks injunctive relief. (Compl. at 6). To the extent that Plaintiff's request for a declaratory judgment might be deemed a request for equitable relief, it would not provide Plaintiff with a remedy here as Plaintiff is not entitled to declaratory relief with respect to any of his claims. The purpose of the Declaratory Judgment Act is to enable parties to adjudicate their disputes before either suffers from great damage." 12 Moore's Federal Practice, § 57.03[2] (Matthew Bender 3d ed.). Therefore, a "declaratory judgment is inappropriate solely to adjudicate past conduct". Gruntal & Co., Inc. v. Steinberg, 837 F. Supp. 85, 89 (D.N.J. 1993). Because Plaintiff's request for a declaratory judgment seeks to have past conduct declared discriminatory, it is not appropriate for declaratory adjudication.

With respect to Plaintiff's request for injunctive relief, although the statute of limitations for Plaintiff's claims for equitable relief is 20 years, Plaintiff has already obtained the relief sought because he was promoted to a permanent supervisory position in the wood yard in 1999. (Pl.'s Resp. Def.'s Mot. Summ. J. at 2.) Since Plaintiff has been promoted, there is no longer any basis for injunctive relief. In the absence of any basis for equitable relief for wrongful conduct alleged to have occurred in 1987 and 1991, and

Appendix B

given that Plaintiff's entitlement to any other relief for injuries occurring in 1987 and 1991 is foreclosed by the statute of limitations, Plaintiff has no cause of action with respect to any wrongful conduct occurring before December 1996. Therefore, the Court will only address Plaintiff's claim of discrimination stemming from Defendant's 1998 promotion decision.

III. FINDINGS OF FACT

Tenneco Packaging Company, is a paper manufacturer located in Valdosta, Georgia. The company produces kraft linerboard, a product used in the manufacture of corrugated shipping containers and other packaging products. Plaintiff began working at the Valdosta mill in March of 1978 as an extra hand in the pulp mill. After 11 months in the pulp mill, Plaintiff moved to a position on the paper machine, where he remained until 1982.

In June of 1982, Plaintiff, along with approximately six other employees, entered the newly created apprentice program for maintenance mechanics. Plaintiff completed the apprentice program in September of 1985, at which time he became an A-class mechanic. From 1985 to 1989, Plaintiff was assigned as an A-class mechanic on the paper machine. When Plaintiff was on "call duty" he had responsibility for

Appendix B

the whole mill. which meant he occasionally spent time in the pulp mill.

In 1987 Plaintiff applied for a maintenance supervisor position. The maintenance supervisor had responsibility for the mechanical maintenance of the wood yard and the supervision of a project crew. The position requirements included five years experience as a general maintenance mechanic A. In 1987, Plaintiff had two years experience as a general maintenance Mechanic A. and three years experience in the apprentice program. Plaintiff had no experience as a set up supervisor in 1987. Plaintiff was interviewed for the position by Norman Bennett and one or two other people. The position was eventually given to Norman Bush, a white male.

For the period of approximately one year, during 1988, Plaintiff worked as set up on the paper machine under Abb Marshall. In 1989, Bobby Mayer, who had been named as maintenance supervisor, asked Plaintiff to move to the wood yard as set up to replace Dale Marshall who was taking on a special project. Plaintiff then began setting up for Dewey Foster in the wood yard and set up for him until 1992 when Foster was replaced by Andy Bonner. Plaintiff then set up for Bonner until Bonner was replaced by Norman Bush in

Appendix B

1996. Plaintiff set up for Bush for about one year and also set up for Abb Marshall. Except for setting up one or two days in the diesel shop, Plaintiff did not set up anywhere but in the wood yard.

In 1991 Norman Bush became supervisor of the diesel shop. Plaintiff applied for the project crew maintenance supervisor job Bush had vacated, which was the same job Plaintiff had applied for in 1987. Although, Plaintiff had some set up experience on the paper machine and in the wood yard, he had no set up experience as a project crew supervisor. The supervisor position was given to Andy Bonner, a white male. Andy Bonner was laid off in 1996 and his position was not filled when he left. Instead Norman Bush took responsibility for both the diesel shop and the wood yard.

In 1997 or 1998, Larry Chaney, a white male, was promoted to a position as maintenance supervisor of the pulp mill. The company did not post a notice that the position was available but before the position was given to Chaney, Plaintiff expressed to Dewey Foster that he was interested in the position. Plaintiff had previously expressed an interest in setting up in the pulp mill as a supervisor but had never done any work in the pulp mill except when on "call duty". The

Appendix B

final decision to promote Chaney to the pulp mill maintenance supervisor position was made by Tom Putnman. who had been the mill manager since October of 1997.

Before he was promoted to maintenance supervisor position. Chaney had been setting up in the pulp mill maintenance supervisor position for approximately a year and a half. The decision to allow Chaney to work as a set up was made by Dewey Foster, who at that time was maintenance superintendent, and Larry Ferrell, who at that time was the manager of maintenance and engineering. Chaney had been employed with the Company since 1967 and had been an A-class mechanic since 1980. Chaney worked as an A-class mechanic primarily in the pulp mill.

In 1999, Plaintiff applied for and was promoted to a maintenance supervisor position in the wood yard.

III. CONCLUSION OF LAW

The Plaintiff in a § 1981 discrimination action bears the ultimate burden of proving that race was a determining factor in the challenged employment decision. Accordingly, Plaintiff here must first establish a prima facie case of discrimination. A prima facie case of discrimination may be established through presentation of direct evidence of discriminatory intent or presentation of statistical evidence.

Appendix B

Because direct evidence of discriminatory intent and statistical information are seldom available, a plaintiff may raise a rebuttal presumption of intentional discrimination using the burden-shifting analysis set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), as refined by the decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1989). The United States Court of Appeals for the Eleventh Circuit has explained the McDonnell Douglas/Burdine test in the following manner:

> Under the McDonnell Douglas/Burdine formulation, a plaintiff must carry the initial burden of establishing a prima facie case of sex discrimination. Once the plaintiff establishes a prima facie case, the burden then shifts to the defendant to produce some "legitimate, nondiscriminatory reason" for the adverse employment decision. Because the defendant need only produce, not prove, a nondiscriminatory reason, this burden is "exceedingly light". Once the defendant carries the burden of production, the plaintiff must prove through presentation of a

preponderance of the evidence that the employer had a discriminatory intent.

Walker v. Nationsbank of Florida, 53 F.3d 1548, 1556 (11th Cir. 1995)(citations omitted). "The plaintiff employee, however, always retains the ultimate burden of proving that he was the victim of intentional discrimination." Evans v. McClain of Ga., Inc., 131 F.3d 957, 963 (11th Cir. 1997).

In the context of a motion for summary judgment, a plaintiff's burden "is met by introducing evidence that could form the basis for a finding of facts, which when taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext". Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 921 (11th Cir. 1993). "Consequently, the essential inquiry for courts considering summary judgment in employment discrimination cases is whether the plaintiff has produced 'sufficient evidence to support an inference that defendant employer based its employment decision on an illegal criterion". Cross v. Southwest Recreational Indus., 17 F. Supp 2d 1362, 1367 (N.D. Ga. 1998)(quoting Jameson v. Arrow Co., 75 F.3d 1528, 1531 (11th Cir. 1996).

Appendix B

A. Direct Evidence

Plaintiff contends that there is direct evidence of discrimination on which to base his prima facie case and the McDonnell Douglas/Burdine test is inapplicable here. (Pl.'s Br. Resp. Def.'s Mot. Summ. J. at 7.) Therefore, some discussion is necessary with respect to whether Plaintiff has satisfied the direct evidence standard.

1. Standard to be Applied

The term "direct evidence" has not been uniformly applied in employment discrimination cases. In a detailed discussion concerning the proper application of the "direct evidence" standard in employment discrimination cases. Judge Tjoflat recently noted that some cases apply a "dictionary definition" of direct evidence, "namely, evidence that, if believed, proves the existence of a fact in issue without inference or presumption." Wright v. Southland Corp., 187 F.3d 1287, 1294 (11th Cir. 1999). Other cases have concluded that "direct evidence consists of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on an improper basis." Wright, 187 F.3d at 1294 (quoting Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999)). Still other cases apply what Judge Tjoflat describes as a "preponderance definition" of direct

evidence. The "preponderance definition" is explained in Wright to mean "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic." Wright, 187 F.3d at 1293.[3]

In spite of Judge Tjoflat's attempts in Wright to create uniformity in the application of a direct evidence standard, the Eleventh Circuit continues to apply a "dictionary definition" of direct evidence. In Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1962 (2000), which was decided after Wright, the court stated,

> We have defined direct evidence of discrimination as evidence which reflects "'a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.'" In other words, the evidence

[3] It should be noted that Judge Tjoflat's pronouncements constitute *obiter dictum*, as neither of the other two members of the panel joined in the opinion. Wright, 187 F.3d at 1306 (Cox, J., concurring in judgment only; Hull, J., concurring in result only).

> must indicate that the complained-of employment decision was motivated by the decision-maker's [discriminatory conduct]. As a result, "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [impermissible criteria'" will constitute direct evidence of discrimination.

2. Plaintiff 's Evidence

Plaintiff argues that the following occurrences constitute direct evidence of discrimination by Defendant:

1. One of Plaintiff's co-employees, David Ward, contends that between 1994 and 1997 he had numerous conversations with Human Resources Director Norman Bennett. Ward contends that during one of these conversations, Bennett expressed concern about the "racists attitudes of the entire mill management" and further expressed that: he could not get the upper management of the mill to follow the affirmative action program." (Pl.'s Ex. F, Ward Aff. ¶ 4.) Ward also alleges that Bennett told him his suggestions to upper management about affirmative action "fell on deaf ears" because "they just did not like African Americans." (Pl.'s Ex. F, Ward Aff. ¶ 4.)

Appendix B

2. Plaintiff's co-employee, Matthew Williams, contends that M.C. Wooley Jr.[4] made the following offensive statements: "What do you people want?" and "Blacks are more likely to be on drugs than whites." These statements allegedly made in 1993 when a group of African-American employees formed a group for the purpose of approaching management about the treatment they have been receiving. (Pl.'s Ex. G, Williams Aff. ¶ 3.)

3. Human Resources Director Dave Cahill allegedly told Uster Anthony that supervisors M.C. Wooley, Jr., Jim Crawley, and Larry Ferrell "did not like blacks" and they "referred to blacks as 'niggers' in conversations they had with him." (Pl.'s Ex. I, Anthony Aff. ¶ 8) The affidavit indicates that Cahill told Anthony about these comments in 1997, but it is not clear from the affidavit when the comments and other remarks were made to Cahill.

4. In 1987, when Plaintiff inquired about why Norman Bush was promoted to a position that Plaintiff

---

[4] Wooley was the mill manager until October of 1997. Tom Putnam took over as the mill manager in October 1997 and, as of June 1999, remained in the mill manager position. (Pl.'s Resp. Def.'s Mot. Summ. J. at 8 n.4.)

believed that he should have received. Plaintiff was told by Bobby Mayer, then superintendent of maintenance, that "the company could choose whoever they wanted to. If any time – you know, they wasn't going to hire any blacks or choose any blacks to go in certain positions." (Thomas Dep. II at 63.) Plaintiff also contends that Mayer told him that "the company had hired a lot of unqualified blacks, but they were not going to make these people supervisors." (Pl.s Objs. & Resp. Def.'s 1st Interrogs. at 2.) Plaintiff did not know what involvement, if any, Mayer had in the decision to promote Bush. (Thomas Dep. II at 64).

5. Plaintiff contends that in 1989, Dewey Foster referred to him as a "boy" on several occasions. (Thomas Dep. II at 60-61.) On one such occasion, after Plaintiff had complained about the crew to Foster, Foster said to him "boy, what's the matter, you can't take it?" (Thomas Dep. II at 62.) On another occasion, when Plaintiff questioned Foster about the way he was handling a bridge repair, Foster called Plaintiff into his office the next day and said, "I don't like the way you spoke in front of Keith [Williams], boy, this is the Old South, and if you want to keep setting up for me, then you had better stay in your place…is that clear?" (Pl.'s Resp. Def.'s Mot. Summ. J. at 12.)

Appendix B

6. Plaintiff's co-employee, David Ward, contends that he was "often" told by Bobby McMillian that the "mill management... were racially prejudiced against blacks." (Pl.'s Ex. F, Ward Aff. ¶ 5.) Ward does not say when these comments were made. Ward also contends that McMillan told him he could not do anything to change the conditions at the mill because the "management just does not want to let go of the old ways." (Pl.'s Ex. F, Ward Aff. ¶ 8.)

7. Larry Ferrell referred to another African-American employee, Beatrice Mercer, as "gal" until she told him her name was Beatrice. (Pl.'s Ex. O, Mercer Aff. ¶ 11.)

In this case, none of the comments which Plaintiff contends constitute direct evidence are attributed to Tom Putnam, who made the decision to promote Chaney over Plaintiff in 1998. Moreover, many of the comments lack sufficient connection to the employment decision at issue here to constitute direct evidence of discrimination. For example, the comments allegedly made by Bobby Mayer in 1987, by Dewey Foster in 1989, and by M.C. Wooley in 1993 are too remote in time from the decision made in 1998 to constitute direct evidence that the decision to promote Chaney was motivated by racism.

Appendix B

Some of the comments which Plaintiff contends demonstrate direct evidence of discrimination are not even evidence of discrimination at all. For example, Beatrice Mercer's affidavit testimony that Larry Ferrell referred to her as a "gal" is not evidence of racism, either direct or circumstantial. Furthermore, some of the comments lack sufficient specificity to constitute direct evidence. For example, in the affidavits of David Ward and Uster Anthony they content that other employees had told them that "management" did not like blacks, or that "management" did not like the affirmative action program. However, such vague references to "management" are insufficient to constitute direct evidence that the specific supervisor and the specific employment decision at issue here were motivated by racism. "At best, these statements merely suggest a discriminatory motive which, by definition, makes them circumstantial evidence." Evans v. McClain, 131 F.3d 957, 962 (11th Cir. 1997).

The Court finds Plaintiff has failed to demonstrate that he has direct evidence of discrimination by Defendant. Accordingly, Plaintiff's evidence will be tested under the McDonnell Douglas/Burdine burden-shifting formula.

Appendix B

B. Burden-Shifting Formula

In the absence of direct evidence of discriminatory motive, Plaintiff may raise a rebuttable presumption of intentional discrimination using the McDonnell-Douglas/Burdine burden-shifting analysis. Under this formulation, Plaintiff carries the initial burden of establishing a prima facie case of discrimination. The basic prima facie case enunciated in McDonnell Douglas, requires a plaintiff to show: (1) that he is a member of a protected group; (2) that he was qualified and applied for the position; (3) that he was rejected despite his qualifications; and (4) that the position was filled by someone outside the protected group.

Here, the Court finds that Plaintiff has failed to satisfy the prima facie case because he has not shown that he was qualified for the position. The position which Plaintiff contends he should have gotten, but which went to Larry Chaney, was that of maintenance supervisor over the pulp mill. However, Plaintiff had almost no experience in the pulp mill, having worked almost exclusively in the wood yard during his tenure at the mill. Plaintiff's only experience in the pulp mill came in 1978, when he first started with Tennece, and again from 1985 to 1989, on the occasions when he had "call duty".

Appendix B

In deciding who should get the maintenance supervisor position, Tom Putnam considered experience in the pulp mill to be a key factor. (Putnam Dep. at 59-60.) Putnam also considered communication skills to be important but was particularly interested in experience. (Putnam Dep. at 60.) Plaintiff, having almost no experience in the pulp mill, cannot show that he met the most important criteria for the position which he claims he should have gotten. Therefore, he has failed to establish a prima facie case of discrimination. Because Plaintiff has not set forth a prima facie case, Defendant is entitled to summary judgment on Plaintiff's claim that Defendant discriminated against him in 1998 when it failed to promote him to the pulp mill maintenance supervisor position.

V. CONCLUSION

The Court finds that Plaintiff is not entitled to relief with respect to any claims he might have for injuries occurring before December of 1996. The Court further finds that Plaintiff has failed to establish a prima facie case of discrimination with respect to his claim of injury occurring in 1998. Accordingly, Defendant is entitled to judgment as a matter of law and its Motion for Summary Judgment is hereby granted.

Appendix B

SO ORDERED. this the 31 day of August. 2000.

/s/

HUGH LAWSON, JUDGE